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No. 86-497 and 86-531

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In The
Supreme Court of the United States
October Term, 1986

—o—

AGENCY HOLDING CORPORATION, ET AL.,
Petitioners

vs.

MALLEY-DUFF & ASSOCIATES, INC.
Respondent

and

CROWN LIFE INSURANCE COMPANY, ET AL.,
Petitioners

vs.

MALLEY-DUFF & ASSOCIATES, INC.,
Respondent.

—o—

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

—o—

BRIEF FOR RESPONDENT MALLEY-DUFF & ASSOCIATES

—o—

HARRY WOODRUFF TURNER*
DAVID A. BORKOVIC
STEPHEN H. KAUFMAN
KIRKPATRICK & LOCKHART
1500 Oliver Building
Pittsburgh, PA 15222
(412) 355-6500
Counsel for Respondent

* Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

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QUESTIONS PRESENTED

I. WHETHER THE PURPOSE OF CIVIL RICO IS BEST EFFECTUATED AND LITIGATION MINIMIZED BY BORROWING A UNIFORM NATIONAL STATUTE FROM THE ANALOGOUS ANTITRUST LAW?

II. IN THE EVENT IT IS DEEMED ADVISABLE TO SUPPLY A STATE STATUTE OF LIMITATIONS FOR CIVIL RICO, WHETHER TO EMPLOY UNIFORMLY THE STATUTE WITHIN EACH STATE THAT IS MOST ANALOGOUS TO RICO?

III. IN THE EVENT IT IS DEEMED ADVISABLE TO SUPPLY THE STATE STATUTE MOST ANALOGOUS TO THE PREDICATE ACTS ALLEGED IN THE COMPLAINT, WHETHER PENNSYLVANIA'S THEN-APPLICABLE SIX-YEAR STATUTE FOR FRAUD ACTIONS BE SUPPLIED?

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STATEMENT OF THE CASE

The Complaint alleges that Clarke Lloyd ("Lloyd"), the Senior Agency Vice President (U.S.) for Crown Life Insurance Company ("Crown" or "Crown Life"), embarked on a plan personally to acquire and control Crown's major general agencies in the Northeastern United States (A7). Lloyd, his protege Kerry Craig ("Craig") and their co-conspirators took over Crown's agencies in Chicago and Cleveland and then turned to Pittsburgh, Pennsylvania, where plaintiff Malley-Duff & Associates, Inc. ("Malley-Duff")* and non-party Jules Ehrman each represented Crown. Using a sham production quota mailed by Lloyd, defendants simultaneously acquired the Ehrman Agency, terminated Malley-Duff, a long-standing, successful Crown Life general agent, and took over its business (A8-9). The conspirators eventually took over Crown's agencies in Toledo, Ohio; Peoria, Illinois; Minnesota; New England; New Jersey; Colorado and Arizona and then used the various agencies to divert vast sums of money from Crown Life. The enterprise Lloyd established, Agency Holding Corporation ("Agency Holding") engaged in and conducted these and various other fraudulent schemes.

Malley-Duff commenced an action in 1978 asserting claims under the Sherman Act, 15 U.S.C. § 1, and various state law causes of action, Civil Action No. 78-373 (W.D. Pa.) (*Malley-Duff I*). The record now shows that Craig and the Agency Holding defendants responded to plaintiff's request for documents in *Malley-Duff I* by shredding documents. When the shredding was discovered, defendants engaged a private detective to investigate the District Judge assigned to this case, promising a bonus if

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*Malley-Duff has no parent company, subsidiaries or affiliates under Rule 28.1.

he unearthed evidence which could be used against the judge. The detective fabricated a story about having such compromising material, and defendants planned to use it to affect the outcome of the case. When the scheme was exposed, the Judge had the action reassigned and the case was delayed two years for a federal grand jury investigation.

The instant action (*Malley-Duff II*) was filed on March 20, 1981, alleging violations of the Racketeer Influenced and Corrupt Organization Act, 18 U.S.C. § 1961 *et seq.*, and the Civil Rights Act, 42 U.S.C. § 1985. The District Court consolidated *Malley-Duff II* with *Malley-Duff I* and the cases proceeded to the point of trial when the court *sua sponte* severed *Malley-Duff I* for the purpose of trial. That case was tried in March-April of 1983. Appeals were taken from the decisions of the court and jury in *Malley-Duff I* resulting in *Malley-Duff & Associates, Inc. v. Crown Life Ins. Co.*, 734 F.2d 133 (3d Cir. 1984), *cert. denied*, 469 U.S. 1072 (1984).[1]

Shortly before the Court of Appeals decided *Malley-Duff I*, summary judgment was granted in *Malley-Duff II* on all counts involving federal statutory questions and the pendent claim was dismissed (A56-58). The Court of Appeals reversed, 792 F.2d 341 (3d Cir. 1986) (A70-103). Certiorari was granted on December 1, 1986.

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1 *Malley-Duff I* remains pending in the District Court where it is awaiting the outcome of this matter so a consolidated trial can be held.

STATEMENT OF THE FACTS

A. Background

Contrary to the innocuous statement of facts presented in the opposing briefs, the consolidated record of the two cases before the district judge when he granted summary judgement included the following: Founded in 1954, Malley-Duff's agency was the oldest of seven general agencies exclusively representing Crown, a major Toronto insurance company, in Pennsylvania (Tr. 599-603, Ex. 3446)[2] and it competed with the Jules Ehrman Agency for the sale of Crown products in the Pittsburgh area. Malley-Duff's position in the market and with Crown seemed secure until Clark Lloyd included it in his plan for a "mega general agency", which became Agency Holding Corporation, controlled directly by him and operated by defendant Kerry Craig (Ex. 5008).

Lloyd became Crown's Senior Agency Vice-President for the United States in 1976, and until 1981, Crown vested him with complete power to appoint and terminate general agents and to approve loans and financing for them (Tr. 95, 172-73, 1242-43). Lloyd abused this power to terminate competent general agents in order to secure the most lucrative franchises for himself, his protege Craig and their corporation, Agency Holding. He also approved financing arrangements which provided vast sums of money to Agency Holding which were misapplied. Crown terminated Lloyd in 1981 and adopted tighter fiscal controls, but never repudiated his activities.

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[2] References designated "Tr." refer to the trial transcript in *Malley-Duff I* which was before the district court when summary judgment was granted. "Ex." refers to exhibits at the trial.

Kerry Craig, at age 21, obtained a job with Crown in 1969 and operated copying machines for three years (Tr. 58). He then transferred to Lloyd's department as a messenger (Tr. 58-9, 1306). In 1975, Lloyd named Craig to a supervisory position where he remained until he left Crown in 1977 (Tr. 59-60) to carry out Lloyd's plan as the nominal head of Agency Holding. Lloyd considered Craig an "unofficial adopted son" (Tr. 62).[3]

B. The Evolution of the Enterprise

1. Chicago, Cleveland and Preparations for Pittsburgh

In October 1976, Crown's general agent in Chicago died. Lloyd, responsible for finding a replacement, revealed to a friend, Dennis Cunningham, that he was forming a "mega general agency holding corporation" (Tr. 1075-76). Beginning in Chicago, Cleveland, Pittsburgh and Toledo, this corporation would eventually control Crown Life's general agencies in the eastern United States (Tr. 1075-77). Craig and Robert Oglevee eventually joined Lloyd in this plan, but Cunningham declined to participate. In 1977, Lloyd had Agency Holding incorporated and installed it as general agent in Chicago. He then qualified it to do business in Ohio and Pennsylvania. Craig, a Canadian citizen, began the process of obtaining a visa so that he could operate Agency Holding from within the United States.

Lloyd next terminated Crown's general agent in Cleveland and in May 1977, awarded that general agency to

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[3] The facts common to *Malley-Duff* I and II were cogently summarized by Judge Aldisert in *Malley-Duff & Associates, Inc. v. Crown Life Insurance Co.*, 734 F.2d 133 (3d Cir. 1984).

Agency Holding (Tr. 73-74, 1343-44). Oglevee was the president, but Craig, who was still employed by Crown Life and who made no investment in Agency Holding, was the majority stockholder (Tr. 89, 1183-87).

On July 12, 1977, the Immigration and Naturalization Service granted Craig permission to work in this country. Three days later, Craig resigned from Crown Life effective September 1, 1977 (Ex. 3330) and became head of Crown's general agencies in Chicago and Cleveland (Tr. 107-09, Ex. 1151).

2. Pittsburgh

Lloyd and Craig traveled to Pittsburgh in August 1977, and met with the owners of Malley-Duff, Thomas E. Malley and James Duff (Tr. 111, 614). Lloyd first professed dissatisfaction with Malley-Duff's production which had exceeded $5,000,000 in 1976 (Tr. 111-12). He then delivered an ultimatum: Crown Life was either going to establish a new general agent in Pittsburgh or expand the Ehrman Agency; Malley-Duff would be terminated unless it met a production quota (Ex. 7003).

The written quota Lloyd imposed in August 1977, required Malley-Duff to produce $7,500,000 of business by December 10, 1977, the year then in progress (Ex. 7003). Less than four months remained in the fiscal year when plaintiff learned that it had to produce 150% of its busi-

ness from the entire preceding year.[4] To ensure the desired result, Lloyd continued the quota beyond 1977: $10 million in 1978, $15 million in 1979 and $20 million in 1980, an increase of 300%[5] (Ex. 7003).

Given the quota's timing and level, the preordained followed. Malley-Duff's 1977 production exceeded that of 1976 but fell short of the quota. On January 11, 1978, Crown mailed plaintiff a 30-day termination notice (Ex. 7004). Malley-Duff's business was transferred to the Ehrman Agency on February 13, 1978, and plaintiff was driven out of business. Craig and Oglevee then purchased the Ehrman Agency, and the Agency Holding enterprise controlled Crown Life's entire Western Pennsylvania business.

3. Further Expansion of Agency Holding

Having acquired Chicago, Cleveland, Erie and Pittsburgh by February 1978, Lloyd arranged for the conspira-

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[4] Malley-Duff had never had a quota before (Tr. 614), and Crown had never imposed a quota so late into the year to which it applied (Tr. 1143-44). Indeed, Crown had never terminated a general agent producing more than $5,000,000 in business (Tr. 1280). Crown's internal documents disclose the magnitude of Lloyd's quota. *Seventy-eight percent* of Crown Life's United States general agencies failed to produce $7,500,000 in 1977 (Ex. 3446). Malley-Duff's 1977 production placed it in the top third of all of Crown's general agents in the United States, and Pittsburgh was the eleventh largest production area in this country (Tr. 2073).

[5] In addition to the timing and size of the quota, other evidence disclosed that it was a sham designed to eliminate Malley-Duff. Lloyd admitted that he did not expect Malley-Duff to meet the quota. In August 1977, Defendant Oglevee told another general agent that he and Craig would take over Malley-Duff when it was terminated. He and Craig also discussed the obvious fact that their Pittsburgh venture would be more profitable for them if plaintiff was eliminated (Tr. 1193).

tors to be given the Toledo, Ohio and Peoria, Illinois franchises (Tr. 1506). Thereafter, an agency in Minneapolis was terminated by Lloyd and replaced by an Agency Holding subsidiary (Tr. 1508, 1871); two general agents in Colorado were terminated by Lloyd and replaced by an Agency Holding subsidiary (Tr. 129-32); and Crown Life's Phoenix, Arizona general agency was replaced by Agency Holding.

In early 1980, defendants purchased Crown's New Jersey agency despite a moratorium on new territories for Agency Holding imposed by Crown's president (Tr. 2310-11). Lloyd was the only Crown officer who knew of the sale, even though Crown (by Lloyd) guaranteed the purchase price. Shortly thereafter, Lloyd forced the general agent in Hartford, Connecticut to resign and, despite the moratorium, Agency Holding secretly took over its operation (Tr. 1070-75).

In the spring of 1981, growing outcry from the remaining general agents and concern over uncontrolled spending by Lloyd on Agency Holding caused Crown to terminate Lloyd (*See,* Ex. 7012(a)). Lloyd promptly moved to Chicago and took direct command of Agency Holding (Ex. 5032A, Ex. 2850).

4. Unprecedented and Unsecured Financing

Between 1976 and 1981 Lloyd exploited his unfettered control over granting of loans and advances from Crown to general agents in the United States (Tr. 95, 173, 1052-53). When Agency Holding obtained a Crown franchise, Lloyd authorized massive loans and advances that were

unlike any Crown financing before or since (Tr. 1134-35).[6] Millions of dollars were funneled to Agency Holding in this manner.[7]

The "loans" were extraordinary in that: (a) they were unprecedented in amount (Tr. 1133-34); (b) Lloyd handled all such transactions himself, excluding subordinates from their usual roles in reviewing and recommending loans and advances (Tr. 1259-1260); (c) there was no evidence of the purposes of the loans in Crown's files (Tr. 1234-39, Ex. 3656, Ex. 1336); (d) there was little, if any, likelihood of repayment (Tr. 1261); and (e) Crown did not know what use was actually made of the money.

C. Other Acts

Plaintiff's preparation of *Malley-Duff I* met extraordinary resistance. Defendants repeatedly and flagrantly obstructed the orderly administration of justice.

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[6] Crown would advance money to agents to assist in the promotion of Crown's products. Agency Holding mailed false budgets, which Lloyd approved, and thus obtained funds which were distributed to congressional candidates, used to start travel agencies and for the personal benefit of Lloyd and Craig. (Ex. 5043-46). Some money from the "loans" was funneled to Craig in Ontario (Ex. 2850B) and to Lloyd while still at Crown (Ex. 5043-46). At trial Craig first denied passing money to Lloyd, but recanted when confronted with cancelled checks.

[7] Despite its sophistication, Crown could not state how much money had been siphoned off to Agency Holding. A Crown official placed the total debt at between $5,000,000 and $8,000,000 in 1981 (Tr. 1230, 2520-24). Craig, the purported borrower, denied knowing how much he owed Crown (Tr. 163-69), professed ignorance about various large loans (Tr. 181-91, 314) and claimed not to know the use to which the money was put (Tr. 191).

1. The Shredding of Evidence

On May 25, 1978, plaintiff in *Malley-Duff I* filed its first request for production addressed to Agency Holding (Ex. 7022, 7024). The request sought a wide range of documents pertinent to the origin and establishment of Agency Holding and the roles of Craig and Lloyd therein. However, Agency Holding produced only a few routine documents (Ex. 7023, 7025). The reason for the meager response was eventually uncovered. In early June 1978, Craig directed Diane Pariano (Mrs. Craig at the time of trial) to travel from Cleveland to Chicago to "gather" documents. Upon arriving in Chicago, she purchased a paper shredder using cash. Pariano and Craig collected a large number of documents (Tr. 369-70, 961) and instructed a clerk, Miss Beemsterboer, to shred them. When the shredding came to light, Craig put the paper shredder in a public trash barrel in Chicago (Tr. 381-84). He asked Miss Beemsterboer to testify that she could not remember the shredder, but she refused (Tr. 973-74). When Malley-Duff caused a subpoena for Miss Beemsterboer to issue, the United States Marshal in Chicago attempted service, but was told she had left town. In fact, she had been hidden at the instruction of Craig (Tr. 948-54).

2. Attempted Blackmail of the District Judge

In April and May 1979, when Malley-Duff had filed a motion for sanctions in *Malley-Duff I*, defendants embarked on a bizarre plot. They engaged a private detective, Joseph Downey, to investigate the Honorable Hubert I. Teitelbaum, the District Judge assigned to the case (Tr. of May 31, 1979 at 174-78, Craig depo., p. 231-32). Craig and Oglevee met with Downey and instructed him to find

evidence of wrongdoing by the Judge (Tr. of May 31, 1979 at 339, 417). Downey was promised a special bonus if he found any evidence of a wrongful connection between plaintiff's counsel and the Judge or if he got the judge recused (Tr. of May 31, 1979 at 327). Downey fruitlessly pursued his investigation for some weeks then falsely reported that he had followed Judge Teitelbaum to a restaurant where he photographed the Judge dining with Malley-Duff's counsel and a reputed underworld chieftain (Tr. of May 31, 1979 at 178-88).

Defendants pressed Downey for a copy of the photograph. Agency Holding's then lawyer admitted that when he got the photograph, he intended to show it to Judge Teitelbaum in chambers and see what the judge wanted to do about the *Malley-Duff I* case (Tr. of May 31, 1979 at 413-17).

On May 6, 1979, the blackmail plot began to unravel when Craig blurted a statement about the photograph in his deposition (Craig depo. p. 229). Plaintiff then began an investigation and subpoenaed Downey to attend a hearing concerning the shredding of documents. Downey did not appear because his car was blown up and he received a telephoned death threat (Tr. of May 31, 1979 at 166-68, 172). Downey was then arrested on a bench warrant and took the stand in open court where he confessed that his story was fabricated (Tr. of May 31, 1979 at 282-86). Having found no wrongdoing, he invented the story his clients had wanted to hear. Judge Teitelbaum then stayed the civil action, referred the matter to the United States Attorney and reassigned the civil case to another judge.[8]

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[8] The stay was in effect for almost two years. The Complaint also alleges that various defendants suborned and committed perjury, harassed and intimidated other witnesses, and engaged in commercial bribery (A10).

The Complaint seeking redress for the fraudulent and illegal activity was dismissed by the District Court, reinstated by the Court of Appeals for the Third Circuit and now comes before this Court for adjudication.

SUMMARY OF THE ARGUMENT

Civil RICO contains no express statute of limitations. Three possible approaches for filling this gap have been articulated. The most practical solution is to apply to all civil RICO actions the limitations period for the most analogous federal statute, either the Clayton Act or criminal RICO. The adoption of a single national limitations period will avoid needless litigation and choice of law problems and will further the important national objectives of RICO.

The second, and next best approach, is to follow the Court of Appeals below and in each state adopt a uniform period of limitations borrowed from state law. Under this approach, the Court of Appeals' selection of Pennsylvania's six year "catch-all" provision was a wise choice. Pennsylvania has no civil "little" RICO statute, but in states which do, its statute of limitations seems more apt. Since most civil RICO cases involve some type of fraud, the limitation period for fraud is also a fair analogy.

The third approach, the selection in each case of the limitation period applicable to the state cause of action most analogous to the predicate acts alleged in the complaint, is undesirable because it would create much unnecessary litigation. If, however, the Court deems this borrowing approach worthy, Pennsylvania's six-year fraud statute in effect at the time of the underlying events would be most analogous.

Finally, whatever statute of limitations is chosen, it should not be applied retroactively against parties which reasonably relied upon longer statutes. Moreover, if the Court chooses an approach which will cause a two-year statute (or less) to be applied in the present case, the issue of accrual will need to be addressed. In that event, the statute of limitations should not begin to run until a plaintiff knows or should know of his injury and that a RICO cause of action exists. Alternatively, the limitation period should not begin to run until a plaintiff knows or should know of the last overt predicate act relied upon in his complaint. In the present case the issue of accrual, if relevant, is a fact issue for the jury. Most importantly, the Court should avoid imposing a narrow, crippling limitations period or accrual rule contrary to Congressional purposes.

ARGUMENT

I. MALLEY-DUFF'S CLAIM IS NOT BARRED BECAUSE THE STATUTE OF LIMITATIONS FOR ALL CIVIL RICO CLAIMS SHOULD BE THE STATUTE OF LIMITATIONS APPLICABLE TO THE MOST ANALOGOUS FEDERAL STATUTE

Civil RICO contains no express statute of limitations. When a federal statute does not provide a limitations period, courts generally apply or "borrow" the state limitations period applicable to the state cause of action most analogous to the federal statute in question. *United Automobile Workers v. Hoosier Cardinal Corp.*, 383 U.S. 696 (1966). Accordingly, most lower courts considering civil RICO claims have routinely borrowed the state limitations period applicable to the state cause of action deemed most analogous to civil RICO. However, borrowing state

statutes of limitations is a matter of expedience, not mandatory law. Given the proper circumstances, federal courts can and should apply the analogous federal limitations period[9] to achieve Congressional objectives and to articulate a uniform national limitations period.[10]

State statutes of limitations should not be absorbed if they discriminate against or undermine national policies or federal rights.[11] *See DelCostello v. International*

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[9] Although most federal courts have applied state limitation periods to civil RICO, their opinions are not persuasive authority on the question of whether to apply federal rather than state law because, with few exceptions, they have focused solely on which state statute to apply without considering the federal option. In the present case, the Court of Appeals considered applying the four-year statute of limitations of the Clayton Act to civil RICO actions, but decided that on balance, the reasons favoring borrowing a uniform federal law were outweighed by opposing considerations. *Malley-Duff*, 792 F.2d at 350, n. 17. However, in a concurring opinion both below and to a *Malley-Duff* companion case, *A. J. Cunningham Packing Corp. v. Congress Financial Corp.*, 792 F.2d 330 (3d Cir. 1986), Judge Sloviter concluded that the statute of limitations for civil RICO claims should be the four-year limitations period of the Clayton Act. *Id.* at 341.

[10] Scholarly commentators recommend the uniform adoption of federal law for use with civil RICO. *See* Blakey and Gettings, *Racketeer Influenced and Corrupt Organizations (RICO): Basic Concepts—Criminal and Civil Remedies*, 53 Temp. L.Q. 1009 (1980); Note, *A Uniform Limitations Period for Civil RICO*, 61 Notre Dame L. Rev. 495 (1986); Note, *Civil RICO: A Call For a Uniform Statute of Limitations*, 13 Fordham Urb. L.J. 205 (1985); Special Project, *Time Bars in Specialized Federal Common Law: Federal Rights of Action and State Statutes of Limitations*, 65 Cornell L. Rev. 1011, 1081 n.329 (1980).

[11] This concept is supported by analogy to the supremacy clause, U.S. Const. Art. VI, cl. 2. Although, technically the supremacy clause only pre-empts state laws which interfere with federal laws and the rights secured by such laws and a statute

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Brotherhood of Teamsters, 462 U.S. 151 (1983); *Occidental Life Insurance Company of California v. Equal Employment Opportunity Commission*, 432 U.S. 355 (1977); *See also Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454 (1975); *County of Oneida, New York v. Oneida Indian Nation of New York State*, 470 U.S. 226 (1985); *McAllister v. Magnolia Petroleum Co.*, 357 U.S. 221 (1958). As the Court stated in *DelCostello:*

> In some circumstances, . . . state statutes of limitations can be unsatisfactory vehicles for the enforcement of federal law . . . "[T]he court has not mechanically applied a state statute of limitations simply because a limitations period is absent from the federal statute. State legislatures do not devise their limitations periods with national interests in mind, and it is the duty of the federal courts to assure that the importation of state law will not frustrate or interfere with the implementation of national policies. 'Although state law is our primary guide in this area, it is not, to be sure, our exclusive guide.' "

462 U.S. at 161 (quoting *Occidental Life Ins. Co.*, 432 U.S. at 367).[12]

(Continued from previous page)

of limitations "borrowed" as a rule of decision in federal courts is not operating as a state law of its own force, a federal court should not borrow a state limitations period that conflicts with federal rights for the same reasons justifying pre-emption. *See County of Oneida, New York v. Oneida Indian Nation of New York State*, 470 U.S. 226, n.13 (1985); *See also* Special Project, *supra* note 10, at 1045.

12 *See also Barnett v. United Air Lines, Inc.*, 738 F.2d 358, 363 (10th Cir.), *cert. denied*, 469 U.S. 1087 (1984). ("Even when a state statute appears appropriate, if another relevant *federal* statute exists that clearly reflects the interests Congress intended to protect under the federal statute in question, we must apply it") (emphasis in original).

DelCostello held that federal hybrid actions against employers and unions for breach of collective bargaining agreements and the duty of fair representation are governed by the federal limitations period of section 10(b) of the National Labor Relations Act, as amended, 29 U.S.C. § 160(b). This Court reasoned that: (a) the policies underlying the federal law and the practicalities of litigation made application of federal law more appropriate because, among other things, the state limitations period applied by the lower courts was too short to allow plaintiffs to assert their rights; and (b) a federal statute of limitations was available which better accommodated federal interests and provided a better analogy to the underlying action than any state-law parallel. *DelCostello*, 462 U.S. at 166, 169. Similar reasoning suggests use of a federal model in civil RICO.

A. Federal Law Is A More Appropriate Choice

There are numerous reasons why the statute of limitations for civil RICO should be derived from federal law. First, state limitations periods, such as the one recommended by defendants, may be too short to effectuate RICO's policies. A person injured by a single predicate act may not immediately realize that the act is part of a "pattern of racketeering activity".[13] Such realization may well not occur until discovery is commenced in an action on the injury-causing act. If the statute of limitations on the first predicate act is relatively long, a short civil

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[13] To be found liable for a civil RICO violation, a defendant, among other things, must have engaged in a "pattern of racketeering activity," 18 U.S.C. § 1962(c) (1982), which is defined as requiring *at least* two predicate acts of racketeering activity which must occur within ten years of one another. *Id.* § 1961(5).

RICO statute of limitations will unfairly bar many private RICO actions.[14] Furthermore, because RICO offenses are often complex and geographically dispersed and given RICO's criminal nature, a potential litigant may not learn that a pattern of racketeering activity exists until an indictment is returned or other substantial investigation made. *See Creamer v. General Teamsters Local Union 326*, 579 F. Supp. 1284 (D. Del. 1984).

The need for a relatively long limitations period is indicated by the many states which have enacted analogues to civil RICO, the so-called "little" RICOs.[15] Of those states, seven provide a five-year limitations period, one

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[14] For example, at the time Malley-Duff was injured by Defendants' fraudulent activity, the Pennsylvania statute of limitations for fraud was six years. *See A.J. Cunningham Packing Corp.*, 792 F.2d at 337. Nonetheless, defendants would have this Court choose a two-year statute that would bar a RICO action four years before the underlying fraud claim would be barred.

[15] A typical little RICO statute provides in relevant part:

> Any person who is injured in his business or property by reason of any violation of NRS 207.400 [which is analogous to 18 U.S.C. § 1962] has a cause of action against a person causing such injury for three times the actual damages sustained. An injured person may also recover attorney's fees in the trial and appellate courts and costs of investigation and litigation reasonably incurred.

Nev. Rev. Stat. § 207.470 (1985).

Additionally, a "civil action or proceeding under NRS 205.470 may be commenced at any time within 5 years after the violation occurs or after the injured person sustains the injury, whichever is later." *Id.* § 207.520.

a six-year period and two seven years. Only one state has an express limitations period shorter than five years.[16]

A federal limitations period will complement RICO's broad national purpose of eradicating organized crime in a way local law cannot. For example, the RICO violations alleged in the present action deal with injuries and activities spanning many states and many years; situations state legislatures normally do not contemplate when enacting limitations periods for local wrongs. *Cf. Association of Flight Attendants v. Republic Airlines, Inc.*, 797 F.2d 352 (7th Cir. 1986) (A federal statute of limitations applied to an airline's dispute with union as the most appropriate statute for use with a national problem.)

B. There Is An Analogous and Appropriate Federal Statute

RICO is closely analogous to the Clayton Act, 15 U.S.C. § 15, and

> when a rule from elsewhere in federal law clearly provides a closer analogy than available state statutes, and when the federal policies at stake and the practi-

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[16] Ariz. Rev. Stat. Ann. § 13-2314(G) (Supp. 1983) (seven years); Fla. Stat. Ann. §895.05(10) (West Supp. 1983) (five years); Ga. Code Ann. § 16-14-8 (1984) (five years); La. Rev. Stat. Ann. § 15:1356 (West Supp. 1987) (five years); Miss. Code Ann. § 97-43-9 (Supp. 1986) (five years); Nev. Rev. Stat. § 207.520 (1985) (five years); N.D. Cent. Code § 12.1-06.1-05 (1985) (seven years); Ohio Rev. Code Ann. § 2923.34 (Page's Supp. 1985) (five years); Or. Rev. Stat. § 166.725 (1985) (five years); Wash. Rev. Code Ann. § 9A.82.100 (West Supp. 1987) (three years); Wis. Stat. Ann. § 946.87 (West Supp. 1986) (six years). Moreover, those states with a five-year period and Wisconsin provide that if a little RICO criminal prosecution is brought, the limitations period on a little RICO civil action based in whole or part upon any matter complained of in the criminal prosecution is suspended during the pendency of the criminal proceedings and for two years after their termination.

> calities of litigation make that rule a significantly more appropriate vehicle for interstitial lawmaking, we have not hesitated to turn away from state law.

DelCostello, 462 U.S. at 171-72.[17] Even if a "state statute appears 'appropriate', if another relevant *federal* statute exists that clearly reflects the interests Congress intended to protect under the federal statute in question, we must apply it." *Johnson*, 421 U.S. at 462 (emphasis in original).

Civil RICO, like the Clayton Act, provides a remedy for behavior that causes economic injury. Both impose criminal and civil sanctions. Both provide for the civil recovery of treble damages, costs of suit and attorney's fees. *See* 15 U.S.C. § 15; 18 U.S.C. § 1964(c). *See also Electronic Relays (India) PVT Ltd. v. Pascente*, 610 F. Supp. 648 (N.D. Ill. 1985). Both require a plaintiff to prove an injury to his "business or property" by reason of a violation of the substantive statutes. Moreover, analogy to the Clayton Act is particularly compelling because legislative history undeniably shows that RICO was modeled on the federal antitrust laws and that § 1964(c) was specifically modeled on the Clayton Act. *See Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 105 S. Ct. 3275, 3280-82 (1985).

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[17] As an alternative to the Clayton Act, the Court could adopt the five-year limitations period generally found to be applicable to criminal RICO inasmuch as both criminal and civil RICO are designed to serve the same Congressional purpose of eradicating organized crime. *See United States v. Forsythe*, 560 F.2d 1127 (3d Cir. 1977); *United States v. Boffa*, 513 F. Supp. 444 (D. Del. 1980). *See also* ABA Section of Corporation, Banking and Business Law, *Report of the Ad Hoc Civil RICO Task Force* 393 (1985), hereinafter referred to as the "Task Force Report"; Note, *Civil RICO: Searching for the Appropriate Statute of Limitations in Actions Under Section 1964(c)*, 14 Loy. U. Chi. L.J. 765, 793-94 (1983).

RICO's legislative history is replete with analogies and references to its antitrust origins. Senator Hruska expressly recognized the similarity between racketeering activity and typical antitrust type activity: "[w]hether a business is purchased from funds derived from its many unlawful activities, or whether it is acquired by extortion and violence, its aim is monopoly." 116 Cong. Rec. 602 (daily ed. Jan. 21, 1970). Senator McClellan, discussing a RICO predecessor, stated:

> because the [antitrust] remedies have been effective in removing and preventing harmful behavior in the business segment of our economy, they show great promise as tools for attacking organized crime. . . . The many references to antitrust cases are necessary because the particular equitable remedies desired have been brought to their greatest development in this field.

115 Cong. Rec. 9567 (1969). *See also* 113 Cong. Rec. 17999 (1967) (Remarks of Sen. Hruska).[18]

More recently, the American Bar Association ("ABA"), Task Force Report, *supra*, extensively chronicled and analyzed RICO's legislative history and concluded that but for the antitrust concepts of standing and proximate cause and the deleterious effect of commingling criminal enforcement goals with the regulation of competition, RICO would have been an amendment to the antitrust laws. *See also* 115 Cong. Rec. 6993 (daily ed. March

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[18] The American Bar Association also stressed the anti-trust model. At House Subcommittee hearings for civil RICO, the President-elect of the ABA strongly endorsed incorporating antitrust "weaponry" in RICO. *Organized Crime Control Hearings Before Subcommittee No. 5 of the Committee on the Judiciary House of Representatives*, 91st Cong., 2nd Sess. (1970).

20, 1969) (statement of Sen. Hruska). The Task Force Report also concluded that "the flexibility of antitrust type remedies and the liberal procedural rules and devices available under the antitrust laws were intended to be applicable to RICO". Task Force Report at 124.

While RICO was modeled on the antitrust laws, its legislative history is inconclusive as to what statute of limitations Congress intended to be applied. However, given the recent increase in the number of RICO actions, and the unforeseen complexity of determining the appropriate statute of limitations with reference to state law, a federal limitations period is best suited to the practicalities of RICO litigation.

C. Aside from Little RICO Statutes, State Limitations Periods are Inadequate

The lack of an appropriate state law analogy in most states underscores the need to apply a federal limitations period. *See, A.J. Cunningham Packing Corp.*, 792 F.2d at 338-39 (Sloviter, J., concurring).[19] If close state law analogies existed, lower courts would not be so hopelessly divided in attempts to choose analogous state statutes. Defendants' contention that state personal property injury statutes are most analogous to RICO is narrow and simplistic. The Court of Appeals considered and rejected this

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[19] As one commentator noted: "[a]nalogizing to federal periods may be warranted when . . . the federal statute is so complex that even a crude state analogy would be impossible and borrowing of an incompatible state law would impede effective judicial administration of the right. [RICO] might well be an example of such a statute." Special Project, *supra*, note 10, at 1081 n.329.

analogy, *Malley-Duff*, 792 F.2d at 351-352.[20] Moreover, fraud is the most common basis for civil RICO actions. *See Alexander v. Perkin Elmer Corp.*, 729 F.2d 576 (8th Cir. 1984), Task Force Report, *supra*, at 55-58, and in most states, including Pennsylvania, the statute of limitations for fraud is separate from the statute governing injury to property.[21] Moreover, as in the present case, whether injury to intangible property is covered by a state's personal property statute is often subject to great debate and litigation.

RICO's pattern of racketeering activity requirement also makes finding a closely analogous state statute difficult, if not arbitrary. Lower courts have employed two methods to determine which statute to borrow. In the most common approach, each RICO claim is governed by the state limitations periods applicable to the RICO predicate offenses alleged in plaintiff's complaint (the "predicate act approach"). *See Silverberg v. Thomson McKinnon Securities, Inc.*, 787 F.2d 1079 (6th Cir. 1986). The "most analogous" cause of action will often be an arbitrary choice because multiple predicate acts may be covered by different statutes. Moreover, complaints can be manipulated to make predicate acts appear "more analogous" to one type of action than another. Where multi-state conspiracies are involved, forum shopping will be encouraged.

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[20] Crown's argument to the Court of Appeals was substantially the same as its argument to the Court. *See* Crown's Brief at 15-16.

[21] For example, in New York the statute of limitations for fraud is six years, N.Y. Civ. Prac. L. & R. 213 (McKinney Supp. 1987), but the period for injury to property is three years. *Id.* 214. Similarly, Ohio provides a four-year period for fraud, Ohio Rev. Code Ann. § 2305.09 (Page's Supp. 1985), but only three years for injury to personal property. *Id.* § 2305.10.

The second method courts have used to borrow state limitations periods is the "uniform approach," used by the Court of Appeals and modeled upon *Wilson v. Garcia*, 471 U.S. 261 (1985) (holding that all actions brought pursuant to 42 U.S.C. § 1983 are analogous to state causes of action for personal injury). Under the uniform approach, all RICO claims brought in a given state are treated as being analogous to one type of state cause of action. A single state limitations period is then uniformly applied to RICO claims in that state. *See Malley-Duff*, 792 F.2d at 341. The uniform approach is superior to the predicate act approach, *i.e.*, less uncertainty over the statutory period and less waste of judicial resources to determine collateral matters.[22] But as applied to RICO, it is flawed and inferior to the application of a uniform federal limitations period.

The uniform state law approach does not solve many significant issues. For example, if a defendant commits predicate acts in three different states and each state has a different uniform limitations period, plaintiffs could forum shop for the most advantageous limitations period and courts may be forced to unnecessarily consider difficult choice of law problems.[23] Unlike section 1983 actions, where plaintiffs' claims typically arise in a single state,

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[22] These factors, among others, led the court below to hold that the uniform approach should be used for all civil RICO cases brought in the Third Circuit. *Malley-Duff*, 792 F.2d at 353. The benefits of this approach, which is the next best alternative to the application of a federal statute of limitations, are discussed more fully in section II, *infra*.

[23] *See Cope v. Anderson*, 331 U.S. 461 (1947) (In federal question cases, federal courts should absorb state borrowing statutes).

RICO actions tend to cross many state lines making a uniform national statute more practical.

The uniform state law approach will not produce the same practical benefits in RICO actions as it does in section 1983 actions, *i.e.*, collateral litigation concerning choice of law and limitations periods will only be partially curtailed; it will be possible for persons injured by the same conspiracy to be treated differently based upon their residence; and parties will often be unable to determine the applicable limitations period in advance, frustrating one of the principal purposes of limitations statutes. A uniform federal rule on the other hand, "would promote predictability and uniformity" and "would also avoid encumbering the remedial purposes of RICO with an unworkable body of law on the question of which state statute of limitations to apply." *State Farm Fire and Casualty Co. v. Estate of Caton*, 540 F.Supp. 673, 684 (N.D. Ind. 1982) (dictum); *See also A.J. Cunningham Packing Corp.*, 792 F.2d at 339-40 (Sloviter, J., concurring).

Because the Clayton Act is more analogous to RICO than any traditional state cause of action and because Congressional purpose would be better served by adopting a uniform federal limitations period, the four-year statute of limitations of the Clayton Act, 15 U.S.C. § 15(b), should be adopted for use with all RICO actions nationwide. Under this approach, Malley-Duff's entire claim was timely.

II. ALTERNATIVELY, MALLEY-DUFF'S CLAIM IS NOT BARRED BECAUSE, AS HELD BY THE COURT OF APPEALS BELOW, RICO ACTIONS IN PENNSYLVANIA SHOULD BE UNIFORMLY GOVERNED BY PENNSYLVANIA'S SIX-YEAR RESIDUARY STATUTE OF LIMITATIONS

If a state limitations period applies to civil RICO, the uniform approach adopted by the court below should be approved. Under the uniform approach, Malley-Duff's claim was timely brought.

The Court of Appeals followed the approach of *Wilson v. Garcia*, 471 U.S. 261 (1985). In *Wilson*, the issue was the proper statute of limitations for 42 U.S.C. § 1983 actions. The Court held that in each state federal courts should uniformly apply to section 1983 claims the statute of limitations applicable to that state's tort action for personal injury. A three-part test was announced for determining the statute of limitations for federal statutes without an express limitation: (1) whether federal or state law governs the characterization of a claim for statute of limitations purposes; (2) if state law applies, whether the claims should be uniformly characterized or evaluated on a case by case basis and; (3) "which state statute provides the most appropriate limiting principle." *Wilson*, 471 U.S. at 268.

Applying *Wilson*, the Court of Appeals held that all civil RICO claims within each state should be characterized uniformly and that the most appropriate limitations period for all civil RICO claims in Pennsylvania is the six-year residual statute of limitations, 42 Pa. Cons. Stat. Ann. § 5527(6) (Purdon 1981). *Malley-Duff*, 792 F.2d at 353 (A86, 93-96). That decision is the soundest approach un-

der state law and should be affirmed if the Court declines to apply a federal standard.

Uniform absorption of state limitations periods for civil RICO will solve many problems which concerned the Court in *Wilson*. RICO cases currently experience the same "uncertainty, confusion, and lack of uniformity in selecting the applicable statute of limitations"[24] that section 1983 cases did prior to *Wilson*. Like section 1983 claims almost every RICO claim can be analogized to more than one state cause of action, each of which may be governed by a different limitations period. *See Wilson*, 471 U.S. at 272-73. As with section 1983, Congress may not have foreseen the wide range of claims that RICO would embrace.

Congress surely intended the identification of a statute of limitations to be an uncomplicated matter. *See Id.* 471 U.S. at 275. A uniform statute of limitations would further this Congressional goal. A uniform statute would also reduce uncertainty about the proper limitations period and curtail the waste of judicial resources on collateral matters. *See Id.* Thus, the Court of Appeals' application of a statewide uniform statute is consistent with *Wilson* and its underlying policies.

The Court of Appeals' choice of Pennsylvania's six-year residuary statute was also correct.[25] In RICO actions, as in section 1983 actions, analogies to traditional state causes of action "are bound to be imperfect" and "civil RICO is truly *sui generis* . . . particular claims can-

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[24] *Wilson*, 471 U.S. at 272 n.25.

[25] Pennsylvania has no civil "little" RICO statute. In states with such an act, the statute of limitations specified for such actions would be preferred.

not be readily analogized to causes of action known at common law." *Malley-Duff*, 792 F.2d at 347, 353 (A81, 95). For this reason, most courts characterizing RICO broadly have opted for either the limitation for cases arising under a statute or the state catch-all statute.[26] Thus, the Court of Appeals' application of the Pennsylvania residuary statute is reasonable and firmly grounded in precedent.

Although *Wilson* rejected the application of state residuary statutes to section 1983 claims, the Court's reasoning for so doing is inapplicable to the present case. *Wilson* reasoned that:

> The relative scarcity of statutory claims when § 1983 was enacted makes it unlikely that Congress would have intended to apply the catchall periods of limitation for statutory claims that were later enacted by many States. Section 1983, of course, is a statute, but it only provides a remedy and does not itself cre-

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[26] *See Durante Brothers and Sons, Inc. v. Flushing National Bank*, 755 F.2d 239 (2d Cir.) *cert. denied*, — U.S. —, 105 S. Ct. 3530 (1985) (applying New York's three-year statute for actions based on statute); *Compton v. Ide*, 732 F.2d 1429 (9th Cir. 1984) (applying California's three-year statute for actions based on statute); *Teltronics Services, Inc. v. Anaconda-Ericsson, Inc.*, 587 F. Supp. 724 (E.D. N.Y. 1984) *aff'd, In re Teltronics Services, Inc.*, 762 F.2d 185 (2d Cir. 1985) (applying New York's three-year statute); *Victoria Oil Co. v. Lancaster Corp.*, 587 F. Supp. 429 (D. Colo. 1984) (applying Colorado's three-year residuary statute in absence of provision for actions based on statute); *Seawell v. Miller Brewing Co.*, 576 F. Supp. 424 (M.D. N.C. 1983) (applying North Carolina's three-year statute for actions based on statute); *Creamer v. General Teamsters Local Union 326*, 579 F. Supp. 1284 (D. Del. 1984) (applying Delaware's three-year statute for actions based on statute); Task Force Report, *supra*, at 389-90, (specifically approving of cases applying statutes that apply generally to all statutory causes of action that have no express limitations period).

> ate any substantive rights . . . Although a few § 1983 claims are based on statutory rights, . . . most involve much more . . . [t]hese guarantees of liberty are among the rights possessed by every individual in civilized society, and not privileges extended to the people by the legislature [citations omitted].[27]

Unlike section 1983, RICO was enacted long after statutory causes of action and residuary statutes became commonplace. As Judge Higginbotham noted below, it is neither anachronistic nor illogical to reason that Congress would have approved of borrowing such statutes for use with civil RICO. *Malley-Duff*, 792 F.2d at 352 (A94). Further, RICO explicitly enforces statutory rights. Because RICO involves only "privileges extended to the people by the legislature" Congress presumably would approve the use of a limitations period designed for statutory causes of action or, in states such as Pennsylvania, residuary statutes. Also, catch-all statutes are particularly unlikely to discriminate against federal claims, a factor in determining whether a specific limitations period is appropriate. *See Wilson* at 279.[28]

In an effort to confine RICO actions in Pennsylvania to a two-year statute, Defendants urge the Court to adopt a narrow and confining solution by contending that all civil RICO actions nationwide should be uniformly governed by the state limitations period applicable to actions for damage to personal property. Crown Brief at 1415; Agency Holding Brief at 25. This approach is simplistic and un-

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[27] 471 U.S. at 278-79.

[28] Due to the preponderance of fraud issues in RICO cases to date, the limitations period applicable to fraud is another alternative, although it was rejected by the Court of Appeals below.

workable. First, defendants ignore the existence of so-called "little" RICO statutes.[29] The closest analogy to federal civil RICO undeniably will always be the "little" RICO statute.[30] Because fewer than half of the states have civil "little" RICO statutes, however, civil RICO nationwide cannot be uniformly analogous to any one particular type of state law. Any "uniform" characterization of RICO must be done on a state-by-state basis with specific reference to available individual state causes of action. In Pennsylvania, which lacks a civil "little" RICO statute, the Court of Appeals wisely rejected the strained, result-oriented analogy proffered by defendants and found the analogy to the six-year residuary statute most acceptable.

Defendants seek to analogize a complicated broad-ranging federal statute to relatively simplistic, single injury type common law actions which have no relation to RICO. For example, the Pennsylvania statute proffered by defendants as most analogous, 42 Pa. Con. Stat. Ann. § 5524(3) (Purdon 1981), imposes a two-year statute upon:

> (3) An action for taking, detaining or injuring personal property, including actions for specific recovery thereof.

Section 5524(3), however, is manifestly designed to cover traditional forms of action in which injury is immediately obvious such as trover, replevin, detinue and conversion.

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[29] *See* notes 15-16, *supra*.

[30] In *dicta*, the Third Circuit tacitly recognized this truism when it noted that in states with little RICO statutes, the state limitations period controlling such actions might be an appropriate choice for the federal courts to borrow. *Malley-Duff*, 792 F.2d at 347 n.13 (A82-83).

It is unwarranted to characterize these simple, if venerable, property actions as most analogous to an action involving complex interstate criminal activity. *See* note 19, *supra.*

Indeed, at the time this action arose, fraud, the most common RICO predicate activity, was not covered by § 5524 (3) or any other two-year statute of limitations. *See A.J. Cunningham Packing Corp.*, 792 F.2d at 337. Many predicate acts of racketeering, such as loan sharking, are not governed by two-year statutes of limitations in Pennsylvania. By recommending the use of § 5524(3), the defendants divorce RICO from its racketeering foundation and engage in a procrustean effort to secure a two-year statute of limitations.

III. ALTERNATIVELY, MALLEY-DUFF'S CLAIMS ARE TIMELY UNDER THE PREDICATE ACT APPROACH BECAUSE THE STATUTE OF LIMITATIONS FOR COMMON LAW FRAUD IS SIX YEARS

The Court could adopt the "predicate act" approach for civil RICO and apply the state limitations period applicable to the state cause of action most analogous to the RICO predicate offenses alleged in a plaintiff's complaint. *Wilson* recognized that a case-by-case analysis might be appropriate,[31] and lower courts have frequently used the approach. It is the least practical solution because it " 'is virtually guaranteed to incite complex and expensive litigation over what should be a straightforward matter' ". *Malley-Duff*, 792 F.2d at 348-49 (A85) (quoting Task Force Report at 391-92). As explained by the Court of Appeals, RICO's predicate offenses are so varied and overlapping

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31 *Wilson*, 471 U.S. at 268.

that much fruitless litigation would result from determining the proper analogy in each case. *Id.* at 346-49 (A80-86).

If this Court determines to follow the predicate act approach, Pennsylvania's statute relating to fraud is the most cogent choice. The predicate acts alleged in Malley-Duff's complaint are mail fraud, wire fraud, and obstruction of justice. These acts are most analogous to fraud. This conclusion is supported by numerous federal court decisions which have analogized mail and wire fraud to common law fraud,[32] and in this case, by the courts below. The District Court, for example, expressly found that Malley-Duff's termination claims are most analogous to Pennsylvania's cause of action for common law fraud (A58).[33] The Court of Appeals correctly observed that "the parties agreed that common law fraud was the state cause of action most analogous to these [Plaintiff's] claims" (A76). In fact, fraud so pervades the present case that much of the briefing at the Court of Appeals focused on the dispute over the applicable limitation for common law fraud, which was presumed to cover Malley-Duff's action. *See* Crown brief to the Court of Appeals at 9-15.

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[32] *See Argosy 1981-B, Ltd. v. Bradley,* 628 F.Supp. 1359 (D. Utah 1986); *Kirschner v. Cable/Tel Corp.,* 576 F.Supp. 234 (E.D. Pa. 1983); *D'Iorio v. Adonizio,* 554 F. Supp. 222 (M.D. Pa. 1982).

[33] The District Court mistakenly thought a two-year statute of limitations applied to fraud following the adoption of the Pennsylvania Judicial Code (A58-59). The Court of Appeals later held that a six-year limitations period then governed fraud. *A. J. Cunningham Packing Corp. v. Congress Financial Corp.,* 792 F.2d 330 (3d Cir. 1986).

Defendants, on the other hand, contend that under the predicate act approach, Pennsylvania's two-year statute of limitations for taking, detaining or injuring personal property, title 42, § 5524(3), should apply because "the gravamen of Malley-Duff's Complaint . . . is that its business was injured." (AHC at 17). As noted above, this contention is narrow and strained as it attempts to substitute a general description of injury for an analogy to the type of wrong alleged. Malley-Duff alleged wire fraud, mail fraud and obstruction of justice. "Injury to business" is no more than a generic description of damages applicable to all lawsuits brought by plaintiffs engaged in business. Moreover, section 5524(3) does not cover all injuries to business under Pennsylvania law, and defendants' simplistic solution does not account for the multitude of actions and policy considerations underlying a RICO claim and its predicate acts.[34]

For the above reasons, if the Court follows a "predicate act" approach, it should be concluded that fraud is the most analogous cause of action in Pennsylvania, and apply Pennsylvania's then applicable six-year statute of limitations. *See A. J. Cunningham Packing Corp.*, 792 F.2d at 337.

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[34] Defendants' alternative claim that the predicate acts alleged are most analogous to tortious interference with contract is also unpersuasive. Proof that defendants engaged in wire fraud, mail fraud, conspiracy to blackmail, perjury, suborning perjury, and obstruction of justice is no more related to interference with contract than proof of arson. Additionally, defendants' assertion that Pennsylvania's statute of limitations for property damage encompasses tortious interference with contract is a tenuous interpretation of state law which has not been considered by the Pennsylvania Supreme Court.

IV. REGARDLESS OF WHICH STATUTE OF LIMITATIONS APPLIES, MALLEY-DUFF'S CLAIM IS NOT BARRED

A. When The Applicable Limitations Period Began To Run In The Present Case Is A Material Issue Of Fact That Must Be Resolved At Trial

Whichever statute of limitation applies, this Court should not reverse the judgment of the Court of Appeals and reinstate the District Court's judgment because material questions of fact exist concerning the date on which the statute of limitations began to run.[35] The Court of Appeals did not reach the accrual question because it chose a six-year limitations period. The trial court never considered the accrual of RICO actions because it mistakenly commenced the limitations period from the date of the first injury to Malley-Duff as if plaintiff were suing directly under 18 U.S.C. § 1341.

Federal law controls the date on which statutes of limitations begin to run. *Rawlings v. Ray*, 312 U.S. 96 (1941); *Compton v. Ide*, 732 F.2d 1429 (9th Cir. 1984). A statute of limitations generally begins to run when a plaintiff knows or has reason to know of the injury forming the basis for his action. *See, e.g., Holmberg v. Armbrecht*, 327 U.S. 392 (1946); *Bankers Trust Co. v. Feldes-*

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[35] In any event, the District Court's judgment should not be reinstated even if the Court concludes that the statute of limitations had run on the injuries caused by defendants' wrongful termination of Malley-Duff. Suit was filed March 20, 1981. Crown concedes that Malley-Duff's RICO claims based upon the obstructions of justice, such as the attempt to blackmail Judge Teitelbaum in May, 1979, are not barred by the statute of limitations. Crown Brief at 30-32. Similarly, Agency Holding seeks reversal of the Court of Appeals judgment only with respect to Malley-Duff's termination in January, 1978.

man, 648 F. Supp. 17 (S.D.N.Y. 1986). The general rule, however, is antagonistic to and incompatible with RICO's statutory framework because injury to a plaintiff may often precede the existence of a cause of action. *Bankers Trust Co. v. Feldesman,* 648 F. Supp. at 35.

RICO differs dramatically from personal injury actions or typical commercial litigation. A RICO plaintiff must be injured by "reason of a violation" of section 1962. 18 U.S.C. § 1964(c). Such violations require a defendant to engage in a "pattern of racketeering activity." 18 U.S.C. §§ 1962(a)-(c). Whatever the precise meaning of "pattern," *see Sedima,* 105 S. Ct. at 3285, n.14, a violation of Section 1962 could not possibly exist absent a pattern consisting of at least two acts of racketeering activity. 18 U.S.C. § 1961(5).[36]

A cause of action simply cannot accrue before one exists. As the Court stated in *Rawlings,* the words "after the cause of action shall accrue" refer to a "complete and present cause of action" so that a plaintiff could enforce liability by suit. 312 U.S. at 98. In the context of RICO, the statute of limitations cannot begin to run until the plaintiff knows or has reason to know of both his

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[36] Agency Holding implies that pursuant to *Sedima,* a plaintiff has a cause of action if he is injured by a single predicate act, even if there is not yet a pattern of racketeering activity. Agency Holding Brief at 31. Not only does this contradict Crown's position, Crown Brief at 23, but it is not true. Even if a plaintiff is injured by only one predicate act, a pattern of racketeering activity must still exist. *Sedima,* 105 S. Ct. at 3285. Moreover, Agency Holding ignores claims under §§ 1962(a), 1962(b) and 1962(c).

injury and the existence of a pattern of racketeering activity.[37]

The contrary result advocated by defendants is nonsensical and would often render civil RICO useless. If an actor commits numerous related predicate acts separated by a time period greater than the statute of limitations, and the bulk of the total damage is caused by the first predicate act, a plaintiff injured by that act would lose his right to a RICO claim. The defendant, like a biting dog, would be given a "free" first crime, and the Congressional purpose of eradicating organized crime would be frustrated. Moreover, given that Congress expressly provided that RICO is to "be liberally construed to effectuate its remedial purposes," *Sedima*, 105 S. Ct. at 3286, and that a RICO claim can be based on predicate acts ten years apart, it would be incongruous to suppose that Congress intended that injury caused by a first act be noncompensable since a plaintiff cannot bring a RICO claim before a pattern exists.[38]

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[37] *See* Washington's little RICO, Wash. Rev. Code Ann. § 9A.82.100 (West Supp. 1987), which provides that civil proceedings must be initiated within three years after a pattern of criminal activity is discovered or should have been discovered.

[38] This issue is related to defendants' argument that Malley-Duff does not state a RICO cause of action for its termination injuries because at the time the injuries were incurred defendants had committed only one predicate act. Crown Brief at 19-25. In light of the fact that the predicate acts constituting a pattern can be as many as ten years apart, defendants' argument, which is unsupported in law, is absurd. If a person is injured by an act which is later determined to be the first in a series of predicate acts constituting a pattern of racketeering activity, to deny that person compensation would be contrary to the purposes of RICO.

This problem has been recognized by many state legislatures which have enacted "little" RICO statutes. These statutes provide that the running of the limitations period on a state civil RICO action shall be suspended during the pendency of a criminal prosecution and for two years thereafter, when the civil cause of action is based in whole or part upon any matter complained of in the criminal prosecution.[39] Some states have gone even further to insure that claims are not prematurely barred. Nevada expressly provides that the statutory period does not begin to run until after violation occurs, or the injury is sustained, whichever is later, and Arizona and North Dakota provide that there must be actual discovery of a violation. Nev. Rev. Stat. § 207.520; Ariz. Rev. Stat. Ann. § 13-2314; N.D. Cent. Code § 12.1-06.1-05.

As previously stated, material issues of fact exist concerning when Malley-Duff knew or should have known about defendants' pattern of racketeering activity; issues which have not been addressed by either of the lower courts. That these issues must be determined by a fact-finder is clear, precluding summary judgment. Much of the evidence regarding defendants' obstructions of justice is circumstantial and defendants' pattern of illegal acquisitions and other activities became clear only when viewed in its entirety. Similarly, material issues of fact exist concerning when Malley-Duff knew or should have known that defendants' discovery techniques were criminal and not just objectionable and unprofessional. Even if the Court should adopt an approach to choosing a statute of limitations that results in a short period, this case

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[39] *See* note 16, *supra*.

should be remanded for consideration of the accrual issues at trial.

B. Alternatively, The Limitations Period For Civil RICO Should Not Begin To Run Until A Plaintiff Knows Or Should Know Of The Commission Of The Last Overt Act

The statute of limitations should not begin to run until the commission of the last overt act in a pattern of racketeering activity. The statute of limitations normally begins to run from the date of each injury. Instead of applying the general rule to a statute for which it is ill-suited, the accrual of civil RICO claims should be governed by the usual rule for situations involving continuity: the statute of limitations should not begin to run until the plaintiff knows or has reason to know of the injury from the last predicate act on which he relies (the "last overt act rule"). *See Bankers Trust v. Feldsman; see also United States v. Davis*, 576 F.2d 1065 (3d Cir.), *cert. denied*, 439 U.S. 836 (1978); *United States v. Boffa*, 513 F. Supp. 444 (D. Del. 1980).[40]

Under the last overt act rule, an action is timely as long as the last act committed falls within the limitation period. Relief is then granted with respect to earlier re-

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[40] Defendants cite *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321 (1971), for the proposition that in a continuing antitrust conspiracy a cause of action accrues at the time of each injury, and, therefore, Malley-Duff's RICO injuries based on fraud are barred by a two-year statute. Defendants' analogy to *Zenith* is flawed, however, because *Zenith* assumes that a cause of action exists at the time of injury. In the present case, no civil RICO cause of action may have existed at the time defendants committed the first predicate act which injured Malley-Duff.

lated acts that would otherwise be barred by the general rule. *Bankers Trust Co.*, 648 F. Supp. at 36. *See also White v. Bloom*, 621 F.2d 276 (8th Cir.), *cert. denied*, 449 U.S. 995 (1980), 449 U.S. 1089 (1981).

This rule is particularly well suited to civil RICO, and has been utilized by the more thoughtful courts. *See Bankers Trust Co., supra; County of Cook v. Berger*, No. 83 C 3401 (N.D. Ill. 1986) (available on Westlaw ALL-FEDS data base). RICO requires continuity. A plaintiff cannot sue until the defendant has committed at least two predicate acts and there must be a *"factor of continuity plus relationship"* between them. *Sedima*, 105 S. Ct. at 3285 n. 14. As held in *County of Cook, supra:*

> Of necessity, each predicate act brings some harm to a plaintiff, whether directly or as part of a course of conduct. Given the nature of the federal interest in providing relief to those who are injured by a course of continual and related conduct, it would be incongruous to bar, on statute of limitations grounds, recovery for predicate acts taking place outside the limitations period and permitting recovery only for those within the limitations period. The principles of conspiracy law ought clearly to apply, and so long as any of the predicate acts occur within the limitations period, a defendant should have to answer for all of his related and continual acts of harm.

See also United States v. Boffa, 513 F. Supp. 444, 480 (D. Del. 1980) (applying the last overt act rule in a criminal RICO context). Accordingly, civil RICO actions should not accrue until the occurrence of the last overt

act which injures the plaintiff. Since overt acts continued at least into 1981, Malley-Duff's action was timely.

Finally, if the Court's decision regarding the appropriate limitations period and accrual rules for civil RICO would bar Malley-Duff's claim, the decision should be given only prospective application. In *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), the Court identified three factors governing retroactive application of changes in law relating to limitations of action. First, for the decision to be applied nonretroactively, it must have established a new principle of law. Second, the prior history of the rule must be considered to determine whether retrospective operation will further or retard its application. Third, the inequity resulting from retroactive application must be considered.

The Court of Appeals for the Third Circuit has held that *Wilson v. Garcia, supra*, should not be applied retroactively under the *Chevron Oil* standards. *Brown v. Foley*, No. 86-5389 (3d Cir. Jan. 26, 1987); *Pratt v. Thornburgh*, 807 F.2d 355 (3d Cir. 1986). When this case was commenced in March, 1981, no court had held that the Pennsylvania statute of limitations for fraud, the most analogous state law claim, was two years. At that time, the only relevant decision held that the statute of limitations continued to be six years,[41] and the Court of Appeals has since reaffirmed that principle. *A. J. Cunningham Packing Corp., supra.* Applying *Wilson* prospectively in the

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[41] *Culbreth v. Simone*, 511 F. Supp. 906 (E.D. Pa. 1981); *see also* Fiebach & Doret, *A Quarter Century Later—The Period of Limitations for Rule 10b-5 Damage Actions in Federal Courts Sitting in Pennsylvania*, 25 Vill. L. Rev. 851, 855-56 n.26 (1980).

RICO context will not adversely affect its operation to appropriate cases. However, retroactive application would inequitably penalize plaintiffs in many pending cases which were instituted in reasonable reliance upon then existing law. If the Court's decision would result in the borrowing of a short time limitation under state law, the decision should be given only prospective application pursuant to *Chevron Oil Co., supra.*

CONCLUSION

For the above reasons, plaintiff, Malley-Duff & Associates, Inc. respectfully requests that the judgment of the Court of Appeals for the Third Circuit be affirmed and that this case be remanded to the United States District Court for the Western District of Pennsylvania for trial.

Respectfully submitted,

HARRY WOODRUFF TURNER*
DAVID A. BORKOVIC
STEPHEN H. KAUFMAN
KIRKPATRICK & LOCKHART
1500 Oliver Building
Pittsburgh, PA 15222
(412) 355-6500

Counsel for Respondent

* Counsel of Record